A

Universiti Teknologi Mara v Magna Metier Sdn Bhd

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(C)(W)-222–04 OF 2022
ABDUL KARIM, ABU BAKAR JAIS AND COLLIN LAWRENCE SEQUERAH JJCA
25 AUGUST 2023

C

Contract — Building contract — Termination — Whether employer's termination of contract was unlawful — Whether employer had not satisfied preconditions to exercise right to terminate — Whether trial court erred in allowing contractor's counterclaim as amount claimed for was not proven

D

The appellant engaged the respondent to design and build a synthetic hockey field and related works at the appellant's sports centre. The respondent appointed a subcontractor ('APSB') to carry out the works. Disgruntled with the delay in the completion of the works, the appellant gave notice to the respondent that it would claim liquidated and ascertained damages for each day of delay. The appellant alleged that it sent the respondent a default notice by registered post pointing out that if the works were not diligently performed within 14 days, it would terminate the contract. The respondent denied receipt of the default notice. Since the works were not completed, the appellant terminated the respondent's contract and appointed another contractor to complete the works. Thereafter, the appellant claimed the sum of RM2,361,124.06 from the respondent for the additional costs it had incurred to complete the works. The High Court dismissed the appellant's claim on finding that the preconditions entitling the appellant to terminate the contract were not fulfilled thus rendering the purported termination invalid. Since the appellant acknowledged in the termination letter that the respondent had completed 92% of the works, the trial court proceeded to assess the value of the said percentage, determined that it amounted to RM634,452.19 and granted judgment for the said sum to the respondent on its counterclaim. The appellant's instant appeal was only against the allowing of the said counterclaim.

E

F

G

H

Held, unanimously allowing the appeal and setting aside the judgment in the counterclaim:

I

(1) The trial judge made a fundamental error when he granted the respondent judgment for the sum of RM634,452.19 on its counterclaim as the claim for the said sum was never proven (see paras 27 & 36).

(2) The amount claimed by the respondent in its counterclaim was rendered erroneous by the fact that the respondent's claim No 12 was never certified or acknowledged by the appellant and also by the fact that APSB had sued and obtained judgment against the respondent for RM520,000 for work it had done under its subcontract (see paras 30–35).

[Bahasa Malaysia summary

Perayu melantik responden untuk mereka bentuk dan membina padang hoki sintetik dan kerja-kerja berkaitan di pusat sukan perayu. Responden melantik subkontraktor ('APSB') untuk menjalankan kerja-kerja tersebut. Tidak berpuas hati dengan kelewatan dalam menyiapkan kerja-kerja tersebut, perayu memberi notis kepada responden bahawa ia akan menuntut ganti rugi tertentu dan ditetapkan bagi setiap hari kelewatan. Perayu mendakwa bahawa ia menghantar responden notis keingkaran melalui pos berdaftar dengan menyatakan bahawa jika kerja-kerja tersebut tidak dilakukan dengan wajar dalam tempoh 14 hari, ia akan menamatkan kontrak. Responden menafikan penerimaan notis keingkaran. Memandangkan kerja-kerja tersebut tidak disiapkan, perayu telah menamatkan kontrak responden dan melantik kontraktor lain untuk menyiapkan kerja-kerja tersebut. Selepas itu, perayu menuntut sejumlah RM2,361,124.06 daripada responden untuk kos tambahan yang telah ditanggung untuk menyiapkan kerja-kerja tersebut. Mahkamah Tinggi menolak tuntutan perayu apabila mendapati prasyarat yang melayakkan perayu menamatkan kontrak tidak dipenuhi sehingga menyebabkan penamatan yang dikatakan tidak sah. Memandangkan perayu mengakui dalam surat penamatan bahawa responden telah menyiapkan 92% kerja, mahkamah perbicaraan meneruskan untuk mentaksir nilai peratusan tersebut, memutuskan bahawa ia berjumlah RM634,452.19 dan memberikan penghakiman bagi jumlah tersebut kepada responden atas tuntutan balasnya. Rayuan semasa perayu hanya terhadap kebenaran tuntutan balas tersebut.

Diputuskan, sebulat suara membenarkan rayuan dan mengetepikan penghakiman dalam tuntutan balas:

(1) Hakim bicara membuat kesilapan asas apabila beliau membenarkan penghakiman kepada responden untuk jumlah RM634,452.19 atas tuntutan balasnya kerana tuntutan untuk jumlah tersebut tidak pernah dibuktikan (lihat perenggan 27 & 36).

(2) Amaun yang dituntut oleh responden dalam tuntutan balasnya telah tersilap berdasarkan fakta bahawa tuntutan No 12 responden tidak pernah diperakui atau diakui oleh perayu dan juga berdasarkan fakta bahawa APSB telah menyaman dan memperoleh penghakiman terhadap responden sebanyak RM520,000 untuk kerja yang telah dilakukan di bawah subkontraknya (lihat perenggan 30–35).]

Appeal from: *Universiti Teknologi Mara v Magna Metier Sdn Bhd* [2022]

MLJU 1225 (High Court, Shah Alam)

Mohd Firdaus bin Mohamood (Mood & Co) for the appellant.
Nashvinder Singh Gill (Sharif & Khoo) for the respondent.

Collin Lawrence Sequerah JCA:

INTRODUCTION

[1] This appeal arose from a decision made after a full trial at the High Court where the learned high court judge ('HCJ') dismissed the appellant's claim and allowed the respondent's counterclaim in part as follows:

(a) a declaration is made that the appellant had wrongfully terminated the building contract by notice of termination dated 14 February 2014;

(b) a declaration is made that the certificate of non-completion dated 10 October 2013 is wrongful, pre-mature and invalid;

(c) the appellant shall pay to the respondent a sum of RM634,452.19 (which amount represents the remainder sum due and payable to the respondent for the works completed at 92%);

(d) the appellant shall pay interest on the said sum at the rate of 5%pa calculated from 16 December 2019 (the date the counterclaim was filed) until full settlement;

(e) the appellant shall pay costs in the sum of RM25,238 to the respondent; and

(f) the appellant shall pay interest on costs at the rate of 5%pa calculated from the date of judgment until full settlement.

[2] It is pertinent to note that the appeal is in part only, that is, against the decision to allow the counterclaim in part.

[3] The appellant did not appeal against the dismissal of its claim. The appellant is therefore deemed to have accepted the correctness of the decision and the findings of the HCJ in respect of the dismissal of the appellant's claim.

[4] Consequently, this judgment will only address the appellant's appeal regarding the respondent's counterclaim.

PERTINENT FACTS

[5] The appellant is a public higher education institution. The respondent is a construction company. The appellant engaged the respondent to design and build a synthetic hockey field and related works at the appellant's sports centre.

[6] The project was known 'Cadangan Mereka bentuk, Menyiapkan dan Mentauliah Sebuah Padang Hoki Sintetik serta kerja-kerja yang berkaitan di Pusat Sukan Universiti Teknologi Mara (UiTM) Shah Alam, Selangor Darul Ehsan'.

[7] Both parties adopted and entered into a standard form construction contract, that is the Standard Form of Design and Build Contract PWD Form DB (Rev 2007) (Conditions of Contract).

[8] The respondent had appointed Aiman Platinum Sdn Bhd ('APSB') as a subcontractor to perform the works.

[9] The appellant had sent a warning letter to the respondent dated 21 May 2012 ('appellant's warning (safety signage)') which stated as follows, among others:

(a) the respondent had failed to install a safety signage at the site ('safety signage'); and

(b) the respondent was given seven days from the date of the appellant's warning (safety signage) to install the safety signage.

[10] There was an alleged delay by the respondent in the works ('delay (works)') as follows:

(a) the appellant's letter dated 21 January 2013 to the respondent ('appellant's warning (21 January 2013)') had stated as follows, among others:

(i) the respondent did not proceed with the works diligently; and

(ii) the respondent was required to provide to the appellant a reasonable explanation for the delay (works) within 14 days from the date of the appellant's warning (21 January 2013).

(b) according to the appellant's letter dated 21 June 2013 to the respondent ('appellant's warning (21 June 2013)'), it was alleged among others that:

(i) notwithstanding two earlier warnings given by the appellant to the respondent regarding the delay (works), the respondent had not proceeded diligently with the works; and

(ii) the respondent was required to provide to the appellant a reasonable explanation for the delay (works) within 14 days from the date of the appellant's warning (21 June 2013).

[11] The appellant had issued a certificate of delay and extension of time

No 1 dated 18 July 2013 to the respondent ('CDEOT'). The CDEOT stated as follows, among others:

(a) the delay (works) was due to the delay in obtaining the development order for the Works from the local planning authority, 'Majlis Bandaraya Shah Alam'; and

(b) an extension of time of 182 days up to 27 March 2013 ('extended completion date') was given by the appellant for the respondent to complete the works.

[12] The appellant issued the respondent a certificate of non-completion dated 10 October 2013 ('CNC'). According to the CNC, among others:

(a) the respondent had failed to complete the works on the extended completion date (27 March 2013); and

(b) in accordance with cl 45 COC ('cl 45'), the respondent was required to pay liquidated and ascertained damages ('LAD') at the rate of RM1,310 per day (not the appellant).

[13] The appellant alleged that a letter dated 30 January 2014 had been sent to the respondent ('default notice'). According to the contents of the default notice, among others:

(a) as the respondent had not proceeded with the works diligently, the works would not be expected to be completed on the extended completion date (27 March 2013);

(b) the respondent was required to perform diligently the works within 14 days from the date of the respondent's receipt of the default notice or within reasonable time and if the respondent failed to do so, the appellant would terminate the respondent's employment under the contract;

(c) the default notice stated that the appellant sent the default notice to the respondent by registered post; and

(d) the default notice was signed by Sr Hjh Zuraida Yahya (Sr Hjh Zuraida), the director of the appellant's Facilities Management Office.

[14] The respondent had denied receipt of the default notice. Hence the default notice was marked as a 'Part C' document.

[15] The respondent failed to complete the works on the extended completion date (27 March 2012). Consequently, the appellant sent a notice dated 14 February 2014 to terminate the respondent's employment under the contract ('termination notice'). The termination notice stated as follows, among others:

(a) the termination notice had referred to the appellant's letter dated 22 January 2014 to the respondent ('alleged appellant's letter (22 January 2014)');

(b) the respondent had not proceeded diligently with the works;

(c) the respondent had only completed 92% of the works;

(d) the appellant had previously warned the respondent to proceed diligently with the works;

(e) the respondent's employment under the contract was terminated;

(f) the respondent was required to, among others:

(i) cease the works at the site immediately;

(ii) remove all of the respondent's workmen from the site; and

(iii) surrender possession of the site with, among others, equipment and materials on the site.

(g) the works would be completed in accordance with cl 60.1(c) COG ('cl 60.1') and the respondent was required to bear all additional expenses which would arise from the termination of the respondent's employment under the contract; and

(h) the respondent's performance bond and advance guarantee would be forfeited.

[16] The appellant alleged that with regard to the works, the respondent had committed fraud in such a manner ('alleged respondent's fraud'):

(a) the contract required the respondent to install copper cables at the site but the appellant alleged that the respondent had instead installed aluminum cables at the site; and

(b) on 20 January 2014, Encik Mohamad Khairulnizam bin Jalal, the appellant's Facilities Management Officer, lodged Shah Alam Section 6 police report 'Sek. 6/627/14' regarding the alleged respondent's fraud ('appellant's police report').

[17] The appellant had appointed another contractor to complete the works.

[18] By way of a letter dated 6 April 2018, the appellant's sent a certificate of final account to the respondent ('CFA'). The CFA gave details of the appellant's claim against the respondent amounting to RM2,361,124.06 ('alleged appellant's additional cost (works)') as follows:

Total cost incurred by the appellant to complete the works	RM6,725,921.65
Final price of the contract	RM4,364,797.59
Alleged appellant's additional cost (works)	RM2,361,124.06

ANALYSIS AND FINDINGS

[19] The thrust of the appellant's appeal is that the HCJ had erred when His Lordship assessed the respondent's counterclaim based upon the percentage stated in the notice of termination notwithstanding that he had come to a finding that the said notice of termination was invalid.

[20] This was fairly evident in the HCJ's grounds of judgment which, inter alia, held that cl 60.1(b) is a termination clause which is premised on a strict construction and that the appellant is only entitled to terminate the contract upon four conditions being fulfilled which are as follows:

(a) the first condition ('first condition (cl 60.1)') requires the appellant to send a notice to the respondent pursuant to cl 60.1(a) ('cl 60.1(a) notice');

(b) the cl 60.1(a) notice should:

(i) specify the respondent's default ('specified default') under any one of the sub-paras (i) to (ix) of cl 60.1(a) ('second condition (cl 60.1)'); and

(ii) require the respondent to remedy the specified default within:

(1) 14 days from the respondent's receipt of the cl 60.1(a) notice; or

(2) any period of time determined in the cl 60.1(a) notice ('third condition (cl 60.1)').

(c) if the respondent fails to remedy the specified default within either one of the time periods as stipulated in the third condition (cl 60.1), the appellant is entitled to send a written termination notice in accordance with cl 60.1(b) ('fouth condition (cl 60.1)').

[21] The HCJ then went on to state that there was no evidence that the default notice had been sent by the appellant to the respondent. In addition, the HCJ had held that no weight ought also to be given to the default notice.

[22] The HCJ further held that even assuming the appellant had sent the default notice to the respondent, the third condition was not fulfilled because the said default notice dated 30 January 2014 was sent to the respondent after the expiry of the extended completion date which was on 27 March 2013.

[23] The HCJ opined that the appellant ought to have sent the default notice to the respondent before 27 March 2013 stipulating a time frame or a reasonable period of time for the respondent to accelerate the works.

[24] The HCJ held further that the termination notice had referred to the alleged letter of the appellant dated 22 January 2014 but had not adduced any document to prove the alleged appellant's letter dated 22 January 2014.

[25] In the premises, the HCJ held the termination notice to be invalid.

[26] The HCJ after finding thus nevertheless held as follows later in his grounds of judgment when determining the extent of the appellant's obligation to the respondent:

> In the termination notice, the Plaintiff had admitted that the Defendant had performed 92% of the Works.

[27] The HCJ then proceeded to place reliance upon the value of 92% of works performed by the respondent which he quantified as RM4,406,098.58 when calculating the judgment sum in the counterclaim less the necessary deductions and finally arrived at the sum total of RM634,452.19 as the judgment sum of the counterclaim.

[28] The HCJ had therefore, with the greatest of respect made a fundamental error which warranted appellate intervention.

OTHER ISSUES

[29] Although determining the above issue effectively concluded the appeal in favour of the appellant, we also considered the other issues raised in the appeal.

[30] The appellant also submitted that the HCJ had erred when he failed to consider that claim No 12 made by the respondent had not been certified by the appellant due to the failure of the respondent to procure the certification from the site architect in accordance with the contract between the appellant and the respondent.

[31] The appellant submitted that they had previously made payments of 11 payment claims by the respondent. It was also pointed out that the respondent's witness SD1, had confirmed in evidence that the appellant had previously settled all payments and that claim No 12 was never certified and acknowledged by the appellant.

[32] In light of the above incontrovertible facts, the HCJ had therefore clearly erred in holding that the works were 92% completed when in fact the said sum was never certified nor did the appellant acknowledge the amount.

[33] The appellant further submitted that the respondent was not entitled to claim the sum of RM694,962.14 as stated in their counterclaim, as the said amount had not yet taken into account the amount of RM520,000 which was the subject matter of the respondent's subcontractors ('Aiman Platinum') claim against the respondent.

[34] It was also pointed out that the said claim by Aiman Platinum had obtained a judgment in default of the said sum against the respondent.

[35] The abovesaid matters had clearly rendered the amount of the counterclaim by the respondent erroneous.

[36] In the premises, and for the reasons given above, we unanimously hold that the amount of the counterclaim of RM634,452.19 had not been proven.

[37] The appeal is allowed and the decision of the learned HCJ is hereby set aside with costs of RM15,000 subject to allocator.

Appeal allowed and judgment in the counterclaim set aside.

Reported by Ashok Kumar